QUESTION FROM REPRESENTATIVE DINGELL

Q1. Please provide a legal memorandum indicating what authority, if any, the Department has under the Nuclear Waste Policy Act, the Atomic Energy Act, or any other law, to store high-level radioactive waste and spent nuclear fuel on an interim basis?

A1. Prior to the enactment of the Nuclear Waste Policy Act of 1982 (NWPA) DOE had authority and continues to have authority, to accept spent nuclear fuel (SNF) in certain circumstances. Section 55 of the Atomic Energy Act of 1954, as amended, (AEA) (42 U.S.C. 2075), provides that "DOE is authorized to the extent it deems necessary to effectuate the provisions of [the Act] to purchase, . . .take, requisition, condemn or otherwise acquire any special nuclear material or any interest therein." The authority under the AEA may be exercised to further any of its purposes including international cooperation and nuclear nonproliferation, support of research and development in nuclear power, and management of the U.S. nuclear defense programs. 42 U.S.C. 2111, 2112, 2013, 2051(a), and 2152.

Pursuant to this AEA authority, the Department has accepted and stored U.S. supplied foreign reactor fuel at various DOE sites. DOE has also used this authority to accept for research and development purposes small amounts of spent nuclear fuel such as parts of the Three Mile Island melted reactor core and other damaged SNF. DOE also has accepted commercial spent fuel under contracts that pre-date enactment of the Nuclear Waste Policy Act of 1982 (NWPA or the Act).

With enactment of the NWPA, Congress provided a detailed statutory scheme for commercial SNF storage and disposal that, by its specificity, severely limited the Department's commercial SNF storage and disposal options. The NWPA did not affect the Department's authority to accept spent fuel not covered by the Standard Contract mandated by the NWPA. However, the NWPA limits DOE's authority under the AEA to accept SNF from commercial reactors subject to the Standard Contract to the situations specified in the NWPA and, in very limited circumstances, to specific research and development activities that further the goals of the NWPA. 42 U.S.C.10199. The NWPA, in sections 111(a)(5) and 302(a)(4), states that SNF generators should pay for the ultimate disposal of their waste, including the interim storage of that waste until such time that the DOE accepts it for disposal. 42 U.S.C. 10131 (a)(5); 42 U.S.C. 10222(a)(4).

Consistent with this more limited authorization, the NWPA permits the Department to pay for interim storage in two distinct instances. Section 135 of the Act authorized the Department to enter into contracts to assist or provide temporary storage of small amounts of SNF until a repository was available. This authority expired in 1990. Section 141 of the Act authorizes the Department to site, construct and operate a Monitored Retrievable Storage (MRS) facility, but restricts DOE's ability to pursue this option by linking any activity under this section to almost unattainable milestones. 42 U.S.C. 10155-10157. For example, before the MRS can be constructed, the Nuclear Regulatory Commission must have issued a construction authorization license for the main

repository; until the main repository starts accepting SNF, the quantity of spent fuel stored at the MRS site cannot exceed 10,000 MTUs; after the main repository starts accepting SNF, the total quantity of SNF at the MRS site cannot exceed 15,000 MTUs at any one time, and the MRS cannot be located in Nevada.

In a 1989 report to Congress regarding dry cask storage, the Department concluded that the Nuclear Waste Fund was not legally available to pay for on-site storage. That study further concluded that the Fund should not be made available "as a means of providing direct assistance to utilities in their at-reactor storage activities." See Final Version Dry Cask Storage Study at I-110 (U.S. Dept. of Energy, February 1989).

In 1994, a Notice of Inquiry on Waste Acceptance Issues (NOI) issued by the Department sought public comment on, among other issues, whether DOE had statutory authority under the NWPA to provide interim storage of SNF. 59 FR 27007 (1994). In the subsequent 1995 Final Report responding to public comments, the Department determined again that the NWPA explicitly contemplated interim storage in only two instances: interim storage under section 135 of the Act and monitored retrievable storage under section 142 of the Act. Final Interpretation of Nuclear Waste Acceptance Issues, 60 FR 21793 (1995). However, the Report also noted that the interim storage provision had expired and the MRS provisions were unusable because of the required linkages to repository development. The Report concluded that because neither of the NWPA's explicit interim storage authorities applied and because the NWF statutory uses precluded the Secretary from spending NWF monies for construction or expansion of a facility

without express authorization from Congress, the Department lacked authority to provide interim storage under existing law. Specifically, the report stated:

> Interim storage by DOE was contemplated by the Act in only two situations, neither of which currently applies. Under the Act, DOE had authority to offer a limited interim storage option. See 42 U.S.C. 10156. However, that authority has, by its express terms, expired. Under the Act, DOE also has the authority to provide for interim storage in an MRS. That authority is also inapplicable, however, because the Act ties construction of an MRS to the schedule for development of a repository. See 42 U.S.C. 10165, 10168. Because these are the only interim storage authorities provided by the Act, and because the Act expressly forbids use of the Nuclear Waste Fund to construct or expand any facility without express congressional authorization (42 U.S.C. 10222(d)), DOE lacks authority under the Act to provide interim storage services under present circumstances. 60 FR 21793, 21797.

This final interpretation was later one of the issues litigated by commercial nuclear utilities seeking to have DOE begin taking their fuel in two cases filed in the U.S. Court of Appeals for the District of Columbia. See Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272 (D.C. Cir. 1996); and Northern States Power Co. v. U.S., 128 F.3d 754 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 540 (1998). In

those cases the Department again reiterated that it did not have authority under the NWPA to provide interim storage of SNF.

In 1991, the State of Idaho filed suit against the Department challenging DOE's authority to ship spent nuclear fuel for storage at its Idaho facility. In that case, the 9th Circuit found that the Department's contract to store and dispose of fuel with a Colorado utility that was entered into prior to enactment of the NWPA was not subject to the NWPA's restrictions on the Department's payment of SNF storage costs. Idaho v. Department of Energy, 945 F.2d 295 (9th Cir. 1991.) In other words, this case is an anomaly that deals with spent nuclear fuel covered by a contract with DOE that pre-dates the enactment of the NWPA and provides no authority for the Department to store utility SNF under NWPA provisions.

In 2000, the Department settled one of the SNF cases in which the Department permitted a utility to offset its delay damages by taking credits against its future fee payments into the Nuclear Waste Fund (NWF). Utilities not parties to the settlement challenged the settlement on the grounds that credits to fee payments were an improper use of the NWF. That Court found that the Secretary's authority to use the NWF, while not limited to those activities explicitly set out in Section 302(d) of the NWPA (Use of the Waste Fund), did not authorize expenditures of NWF monies on settlement agreements aimed at compensating utilities for their on-site storage costs. Alabama Power v. U.S. Department of Energy 307 F.3d 1300, 1313 (11th Cir. 2002).

QUESTION FROM REPRESENTATIVE DINGELL

Q2. Please provide a legal memorandum addressing the question of whether or not the Nuclear Waste Policy Act of 1982 authorizes the Department of Energy (DOE) to use money in the Nuclear Waste Fund for activities in furtherance of the Global Nuclear Energy Partnership (GNEP).

A2. The Nuclear Waste Policy Act of 1982 authorizes the Secretary to "make expenditures from the Waste Fund [...] only for purposes of radioactive waste disposal activities [...] including: [...] any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site, or to be used in a test and evaluation facility." (42 U.S.C. 10222(d)). To the extent that GNEP activities involve the "treating, or packaging of spent nuclear fuel," for disposal at Yucca Mountain, such activities would come within the scope of radioactive waste disposal activities within the meaning of the Nuclear Waste Policy Act of 1982, and thus the Nuclear Waste Fund could potentially be used for such activities. Any use of the Nuclear Waste Fund for GNEP activities would require the approval of Congress through the appropriation process.

QUESTION FROM REPRESENTATIVE DINGELL

Q3. Could some of the activities DOE plans to undertake in connection with GNEP (such as research and development or waste treatment) also be characterized as integral to the Yucca Mountain repository program? If so, do you believe the Waste Fund could be used to pursue such activities?

A3. As explained above in the answer to Q2, to the extent that GNEP activities involve the treatment or packaging of spent nuclear fuel in furtherance of its disposal at Yucca Mountain, the Nuclear Waste Fund potentially could be used for these activities. Any proposed use of the Nuclear Waste Fund for such activities would require the approval of Congress through the appropriation process. The Department currently has no plans to use the Waste Fund to fund any GNEP activities.